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ONE HUNDRED TWELFTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

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<http://www.house.gov/judiciary>

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July 6, 2011

The Honorable Eric H. Holder, Jr.
Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Dear Attorney General Holder,

On June 24, 2011, I received the enclosed letter from 49 Members of Congress. On their behalf, I write to request relevant documents and witness interviews in order to properly understand U.S. Supreme Court Associate Justice Elena Kagan's involvement in health care legislation or litigation while serving as United States Solicitor General.

In recent weeks, questions have been raised about whether Justice Kagan's prior work on what became the Patient Protection and Affordable Care Act (PPACA) while serving as Solicitor General should disqualify her from hearing challenges to its constitutionality. All parties agree the critical question is the extent of her involvement, as Solicitor General, in formulating the Administration's legal position on the PPACA, which was signed into law by President Obama on March 23, 2010.

During her Senate confirmation, then-Solicitor General Kagan answered "no" when questioned about whether she had ever been "asked about [her] opinion" or "offered any views or comments regarding the underlying legal or constitutional issues related to any proposed health care legislation...or...potential litigation resulting from such legislation."¹ Yet, documents released by the Department in response to recent Freedom of Information Act requests raise questions about that unequivocal denial.

¹ *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. (2010) (written response of Elena Kagan to supplemental questions from Senators Jeff Sessions, Orrin Hatch, Charles Grassley, Jon Kyl, Lindsey Graham, John Cornyn, and Tom Coburn) available at <http://judiciary.senate.gov/nominations/SupremeCourt/upload/ElenaKagan-QFRs.pdf>.

The Honorable Eric H. Holder, Jr.

July 6, 2011

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Based on a review of these released documents, and in order to properly understand any involvement by Justice Kagan in matters relating to health care legislation or litigation while she was Solicitor General, I request that the Department produce the following materials from the period between March 20, 2009 and August 7, 2010:

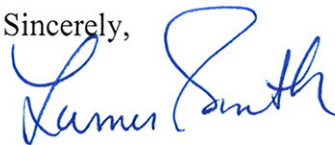
1. All documents referring to any meetings or conversations (personal or electronic) about potential or actual health care legislation or litigation in which Solicitor General Kagan was involved, mentioned or copied.
2. All documents referencing potential or actual health care legislation or litigation in which Solicitor General Kagan was involved, mentioned or copied.
3. All documents referencing excluding Ms. Kagan from any matters involving health care legislation or litigation while she was Solicitor General.
4. All documents referencing possible recusal by Solicitor General Kagan from any matters relating to health care legislation or litigation if she were to be confirmed as a Supreme Court Justice.

In addition, the Committee seeks to interview:

1. Neal Katyal, departing Principal Deputy Solicitor General
2. Tracy Schmalzer, Deputy Director, Office of Public Affairs

Given the speed with which PPACA litigation is proceeding I ask that these materials be provided and arrangements for the interviews be made by July 29, 2011. Thank you for your attention to this important matter.

Sincerely,



Lamar Smith
Chairman

cc: The Hon. John Conyers, Jr.

Enclosure

Congress of the United States
Washington, DC 20515

June 24, 2011

The Honorable Lamar S. Smith
Chairman, House Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515

The Honorable John Conyers, Jr.
Ranking Member, House Committee on the Judiciary
B-351 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Smith and Ranking Member Conyers:

We respectfully call upon the House Judiciary Committee to promptly investigate the extent to which U.S. Supreme Court Justice Elena Kagan was involved in preparing a legal defense of the Patient Protection and Affordable Care Act (PPACA) during her tenure as Solicitor General. Contradictory to her 2010 confirmation testimony before the Senate Judiciary Committee, recently released Department of Justice (DOJ) documents indicate that Justice Kagan actively participated with her Obama Administration colleagues in formulating a defense of PPACA.

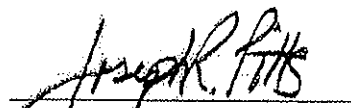
This revelation raises serious questions about Justice Kagan's ability to exercise objectivity in any case relevant to PPACA that comes before the Supreme Court. As you know, Section 455 of Title 28 of the United States Code establishes unambiguous conditions in which federal judges must recuse themselves from proceedings in which their impartiality might be reasonably questioned. According to the law, a justice should recuse themselves in cases "*where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceedings or expressed an opinion concerning the merits of the particular case in controversy.*" Even from the limited number of DOJ emails released to date through a Freedom of Information Act (FOIA) lawsuit, it is evident that Justice Kagan was involved in PPACA defense activities to a degree that warrants her disqualification from related proceedings as specified by Section 455.

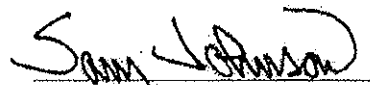
Regrettably the Justice Department has been uncooperative to date with repeated FOIA requests that seek the full body of relevant emails from the Office of the Solicitor General that would reveal the scope of Justice Kagan's involvement in PPACA defense activities. As numerous challenges to PPACA are rapidly progressing through the federal courts, it is increasingly likely that the Supreme Court will be called upon to decide the constitutionality of the law in the near future. This Congress, and the American people, deserve to have confidence in the integrity and impartiality of our Supreme Court and its justices. Towards that end, we ask that the Committee act expeditiously to investigate this matter to the fullest extent possible.

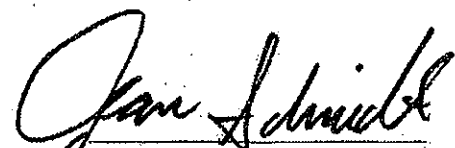
Sincerely,



JOHN FLEMING, M.D.
Member of Congress



MARSHA BLACKBURN
Member of Congress

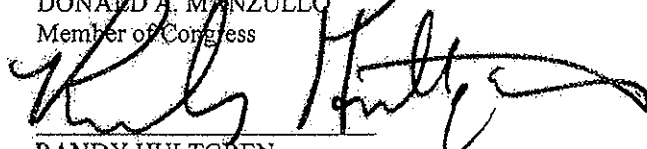

JOSEPH PITTS
Member of Congress

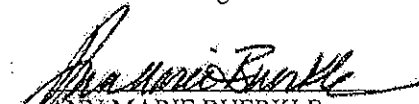

SAM JOHNSON
Member of Congress


JEAN SCHMIDT
Member of Congress

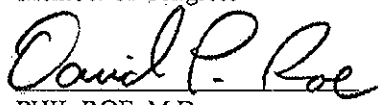

JOE WILSON
Member of Congress

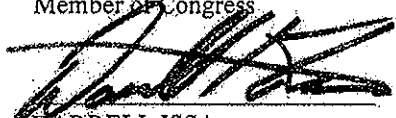

DONALD A. MANZULLO
Member of Congress



RANDY HULTGREN
Member of Congress

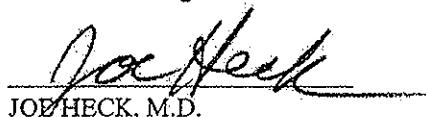

ANN MARIE BUERKLE
Member of Congress



ROSCOE BARTLETT
Member of Congress

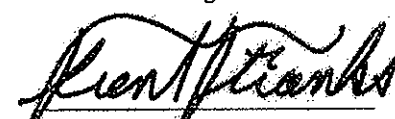

PHIL ROE, M.D.
Member of Congress

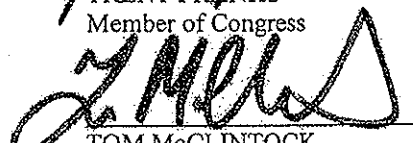

DARRELL ISSA
Member of Congress

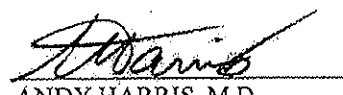

RON PAUL, M.D.
Member of Congress

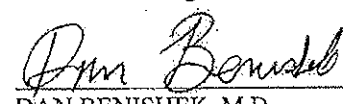

JOE HECK, M.D.
Member of Congress


TED POE
Member of Congress



TRENT FRANKS
Member of Congress



TOM MCCLINTOCK
Member of Congress

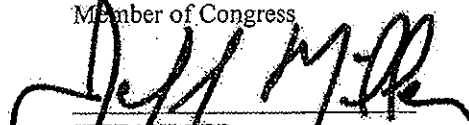

ANDY HARRIS, M.D.
Member of Congress


DAN BENISHEK, M.D.
Member of Congress

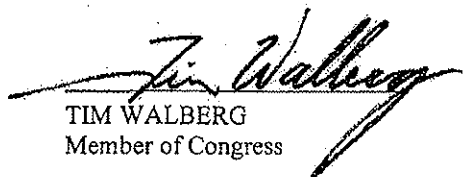

DIANE BLACK
Member of Congress



MO BROOKS
Member of Congress

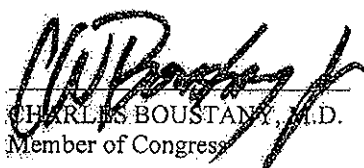

MICHELE BACHMANN
Member of Congress

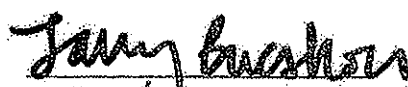

JEFF MILLER
Member of Congress

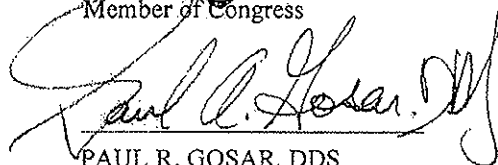

STEVEN C. LATOURETTE
Member of Congress

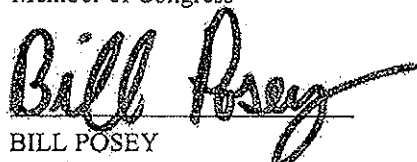

TIM WALBERG
Member of Congress

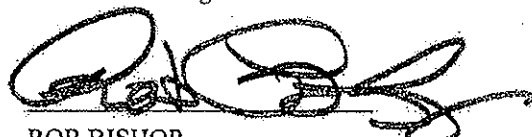

TOM PRICE, M.D.
Member of Congress

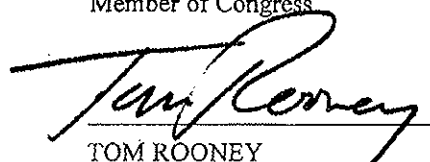

CHARLES BOUSTANY, M.D.
Member of Congress

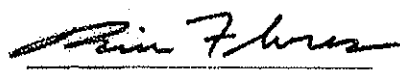

LARRY BUCHANON, M.D.
Member of Congress



PAUL R. GOSAR, DDS
Member of Congress

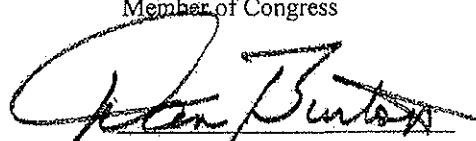

BILL POSEY
Member of Congress

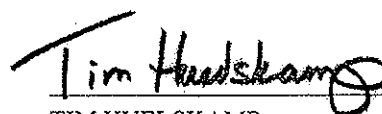

ROB BISHOP
Member of Congress

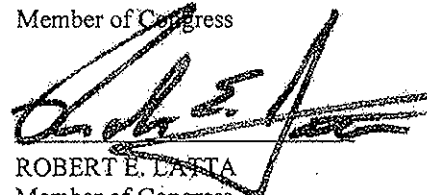

TOM ROONEY
Member of Congress


BILL FLORES
Member of Congress

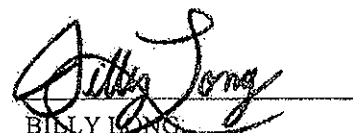

TOM COLE
Member of Congress

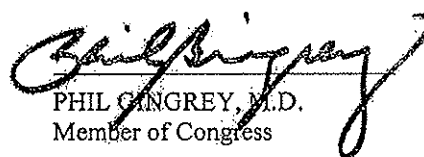

DAN BURTON
Member of Congress


TIM HUELSKAMP
Member of Congress



ROBERT E. LATTA
Member of Congress

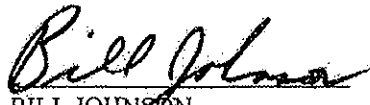

RENEE ELLMERS
Member of Congress


BILLY LONG
Member of Congress


PHIL GINGREY, M.D.
Member of Congress


STEVE KING
Member of Congress


LOUIE GOHMERT
Member of Congress



BILL JOHNSON
Member of Congress



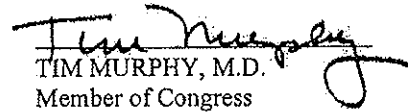
JEFFERY LANDRY
Member of Congress



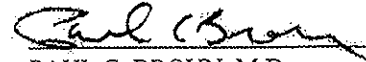
ALAN NUNNELEE
Member of Congress



DOUG LAMBORN
Member of Congress



TIM MURPHY, M.D.
Member of Congress



PAUL C. BROUN, M.D.
Member of Congress



RODNEY ALEXANDER
Member of Congress